



**Republic v Maina & another (Criminal Case 48 of 2016)  
[2025] KEHC 1955 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1955 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CRIMINAL CASE 48 OF 2016  
SC CHIRCHIR, J  
FEBRUARY 20, 2025**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ELKANA MAINA ..... 1<sup>ST</sup> ACCUSED**

**VICTOR MAINA ALIAS SAMUEL ..... 2<sup>ND</sup> ACCUSED**

**JUDGMENT**

1. The accused persons herein were charged with the murder of Cornelius Litali. The particulars of the charge are that on 9th day of September, 2016 at Machine village, Khayega location in Kakamega East Sub -County, within Kakamega County, jointly murdered Cornelius Litali (Deceased).

**The Prosecution’s Case**

2. The first prosecution witness was one Timothy Mmbaka Muchelwa. He told the court that on 9/9/2016 at about 8.30 pm, he was attending a funeral vigil at a neighbour’s house. He and a few other people were inside the house when they heard shouts from outside. He came out and found a young man sitting and holding his head. The head was bleeding. In response to the witness inquiry , the deceased told them that he had been beaten by Elkana and Samuel. He did so while pointing at them. He identified the accused persons in the dock as the persons the deceased was pointing at.
3. He stated that both accused persons were neighbours. He could not distinguish between Samuel and Elkana. He took the deceased home and later heard that he had died.
4. At cross- examination he told the court that he recorded the statement on 28/9/2016 with the police; that he only knew the deceased as Litali and it is the deceased’s mother who later provided the full names. He further stated that there were other people sitting with the deceased. He named them as Chitali Mukabwa, Evan Mwangani and Moi Mwangali among others. He admitted that there were



many people. He had heard shouts indicating that there was a fight. He didn't know how the fight started or who started it and did not know the people who were involved in the fight.

5. PW2 was with the deceased at the time of attack. He testified that at about 11 pm the two accused persons started a fight. He stated that the 1st accused was Elkana while the 2nd was Samuel Maina. He had known the accused persons for 5 years., prior to the incident.

He told the court that the 2nd accused came towards him with a panga. He cut the witness on the back of the right palm (Judge: the scar noted).

6. He further told the court that the 1st accused was holding a iron bar. The first accused hit the deceased with iron bar on his head. He and the deceased had been standing close to each other. The deceased fell down and the PW2 ran away, and went home. Later, at about midnight, some people took the deceased home. The deceased was bleeding from the head. One of the people who took the deceased was one Muyenyi. He could not remember the others.
7. They went and reported the incident at Khayega Police Station then headed to the hospital. After one week the condition of the deceased deteriorated. He was taken to Kakamega County General Hospital where he died. He stated that he identified the accused persons by use of the moonlight.
8. On cross- examination, he told the court that there were about 50 people at the funeral vigil. There was music and dancing.

He remembered Douglas, Ignatius, Bramwel, Timothy, Emmanuel being among those who were present. He stated that the attack took place at 11.40 pm. He further stated that the generator was on, then went off as he ran away. The deceased was hit first, he stated. He further stated that the accused persons came directly to where they were. He didn't know the motive of the attack. He further stated that the accused persons were with other people. They were with their brother Isaiah and Mayaro. That Isaiah and Mayaro chased some other young men. There were no differences between them and the accused persons.

9. PW3 told the court that the funeral preparation was taking place at his home. On the material night , he was inside the house when he heard shouts from outside. He went out and was informed that a fracas had broken out. It was during the burial on 10/9/2016 that he learnt that two young men had been attacked during the fracas.
10. The 4th witness was the pathologist. He told the court that he conducted an autopsy on the body of the deceased on 25/9/2016. The body was identified by Wycliffe Akala and Boniface Miheso; five days had lapsed since the time of death. The body had defence injuries on both forearms. There was evidence of recent medical intervention. Internally, there was a huge blood clot on the left skull above the ear. There was bleeding on the left side of the brain with laceration. He formed the opinion that the cause of death was closed head injury, secondary to blunt force trauma, following assault. The post mortem report was produced and marked as PExb.1.
11. At the close of the prosecution's case , both accused persons were put on their defence.

### **Defence case**

12. DW1 was the first Accused. He told the court that on 9/9/2016 at about 10.00 am, while working in the farm, he was informed that his brother had been arrested on accusation of having killed someone. The police had arrived and then arrested his brother (2nd accused) ,and his father. He was taken to the police station and on arrival, his father was released. He further stated that they were kept for a month in Shinyalu Police Station. He denied killing the deceased. He stated that he was not in the funeral vigil



and he didn't know where it was being held. He stated that it was his co-Accused who informed him about the funeral meeting venue, and that it was far from where they lived.

13. On cross-examination, he admitted that he was a resident of Majira village and the funeral ceremony was also at Majira. He knew the deceased, as he used to see him. He insisted that he was arrested on 9/9/2016 and not 24/9/2016. He further stated that he was aware that the deceased did not die immediately. He further said that the witness who testified of seeing him hitting the deceased lied to the court. He didn't know PW1 and only saw him in court. He could not tell why the deceased would accuse him of the crime.
14. DW2 was the 2nd accused. He told the court that he was arrested alongside his father in the morning of 9/9/2016 at around 7.00 am. At about 12 noon, the 1st Accused was brought in, and his father was released. He told the court that the 1st accused is his brother. He denied the charges while insisting that he was not in the funeral venue.
15. On cross-examination he denied that he recorded a statement with the police. He had no occurrence Book(OB) to show that he was arrested on 9/9/2016. He told the court that he did not know PW2, the deceased and the deceased brother, that he only came to see him in court. He could not think of any reason why PW2 and the deceased would otherwise falsely accuse him.

### **Accused Submission**

16. Through their counsel Ms. Andia, the accused person submits that none of the prosecution witnesses testified to have seen the accused persons commit the offence. She also points out that the investigation officer did not testify; that his/her evidence would have shed light on what transpired between the time of the attack and the time that the deceased died.
17. She further submitted that there was no evidence of an assault report having been made immediately after the deceased was attacked. It is further submitted that there was not clear evidence of identification of the perpetrator as it emerged for instance that, the police had initially arrested the accused persons' father. In this regard, the defence urges the court to exercise greater care in relying on the evidence of identification, especially considering that the incident happened at night.

### **Determination**

18. Section 203 of the [Penal Code](#) defines the offence of murder as follows: "Any person who of malice aforethought causes death of another person by any unlawful act or omission is guilty of murder". Arising from the above definition it follows that in order to secure a conviction for the offence of murder, the prosecution must prove: that someone died and the cause of death; as a result of acts or omissions of the person accused; and the killing was accompanied by malice.

### **Death of the deceased and its cause.**

19. PW4, the pathologist told the court that he carried out an autopsy on the body of deceased on 28/9/2016. The body was identified by Wycliffe Akala and Boniface Miheso Karali. He formed the opinion that the cause of death was a closed head injury, due to blunt force trauma, following assault. The fact that the deceased died and what caused the death was therefore proved.

### **Whether the accused's acts of commission or omission caused the death of the deceased.**

20. PW1 told the court that he came out of the house and found the deceased slumped and holding his head; and had an injury on it; He further stated: "We asked him what had happened and he said he had been beaten by Elkana and Samuel". What the deceased uttered is what has come to be known as a



dying declaration. A dying declaration is an exemption to the general rule against the admissibility of hearsay evidence. It is founded on section 33 (a) of the *Evidence Act*. The section provides inter alia “when a statement is made by a person as to the cause of his death, or to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person’s death comes into question, such statements are admissible whether the person who made was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question “

21. The post-mortem on the deceased’s body was done on 28/9/2016 while the incident happened on 9/9/2016, thus the deceased died at least within 2 weeks of his attack. He had uttered the words at the time of the attack. The period of two weeks between the declaration and actual death in my view was short enough for the deceased’s words to qualify as dying declaration.
22. In Kenya, whereas it is trite law that a dying declaration need not be corroborated, there is a noticeable trend that indicates that courts still do place a lot of emphasis on corroboration, with a goal of ensuring that conviction on the basis of a dying declaration is safe
23. In *Pius Jasanga s/o Okumu vs R* (1954) 2 EACA 331, the Court of Appeal for Eastern Africa held “In Kenya the admissibility of a dying declaration does not depend, as it does in England, upon the declarant having at the time hopeless expectation of imminent death, so that the awful solemnity of his situation may be considered as creating an obligation equivalent to that imposed by taking of oath ....”
24. However in *Aluta Vs Republic* (1985) KLR 543 the court held :

“..... A trial Judge should approach the evidence of a dying declaration with necessary circumspection; it is generally speaking very unsettling to base a conviction solely on the dying declaration of a deceased person made in the absence of an accused and not subject to cross examination, unless there is satisfactory corroboration.
25. Also, in *Choge Vs Republic* (1955) KLR 1 the Court of Appeal held; “There need not be corroboration in order for a dying declaration to support a conviction but the exercise of caution is necessary in reception into evidence of such declaration as it is generally unsafe to base a conviction solely on the dying declaration of a deceased person”,
26. I have considered the evidence of PW2 in this matter and I find that his evidence corroborates the dying declaration of the deceased. PW2 told the court: “ Elkanah (1st Accused) was holding an iron bar. He hit my brother Litali with the iron bar on the head. We had been standing together. I ran away and left my brother having fallen down”.
27. There is consistency between the testimony of PW2 and the deceased on who the attackers were. He had also stated that he had been cut on the right palm, and the court noted and made a note on the scar then appearing on PW’s hand. The fact that he was cut by the 2nd Accused and the presence of the scar lends credence to PW2’s testimony to the effect that he was an eye-witness to what took place.
28. The incident happened at night and therefore the question of identification becomes critical. PW2 told the court that the lights had been put off and he identified the attackers using the moonlight. On cross-examination he stated that the generator was on. He insisted that the light had gone off but generator was on and that the generator only went off as he ran away after the attack. It raises the question as to whether he was able to see the attackers with the help of the moonlight, generator or both?
29. However, I note that PW4 too identified the person who had been attacked when he came out of the house. He was also able to note that the deceased had sustained an injury on the head.



30. PW1 also identified other people he was with on that evening. He stated that there was a Chitali, Evans, Mwangani and Moi Mwangali among others.
31. I take this to ability by other witnesses to also observe what was going on to mean there was enough illumination for both the deceased and PW2 to positively identify the person who attacked them. There was enough illumination, either from the moon or generator or both and the accused persons were positively identified.
32. Thus, the testimony of PW4 and PW2 corroborates the deceased dying declaration. I am therefore satisfied that based on the dying declaration and the testimony of PW2, the prosecution has proved that the 1st accused herein is the one who attacked the deceased causing injuries which led to his death some days later.
33. I have considered the defence of the 1st Accused. He told the court that he did not know the venue of the funeral preparation; that he got to know it from his co- accused after he was arrested. However, he admitted, at cross- examination , that he was a resident of Majira village and admitted that the funeral preparation was also in Majira. He knew the deceased and his brother (PW2). He was also aware about the fact that the deceased did not die immediately, but almost a month later. The above admissions, considered wagainst what he had told the court in his evidence -in -chief portrayed the 1st accused as less than candid. It cast a shadow on his credibility.I find his defence not plausible and I hereby dismiss it.
34. Save the deceased, none of the other witnesses , including PW2 testified to have seen the 2nd Accused attacking the deceased. For want of corroboration am hesitant to solely rely on the deceased' declaration in this regard. There is no evidence therefore linking the 2nd Accused to the deceased's death.
35. Failure of the investigation officer to appear and testify was in my view, was not fatal to the prosecution's cases. It is only where there are unexplained gaps on investigations that an Investigation Officer could be useful in filing them up. The advocate for the accused has submitted that the Investigation Officer ought to have present to explain, inter alia what transpired between 9/9/2016 in about 3 weeks or so. But the testimony of PW2 covered that, as he told the court that after one' week's stay at home, the deceased got worse and was taken back to the hospital where he died the following day.
36. Granted, there was the unanswered question as to when the Accused persons were arrested. I don't consider this to be material to the prosecution's case. This was material to the defence . However the defence did not raise any complain in this regard for the court to address it. In as far as the prosecution's case is concerned , am of the view that failure by the investigations officer did not leave any significant gaps on the prosecution's case.

### **Malice aforethought**

37. Section 206 of the [Penal Code](#) sets out acts of circumstances which constitute malice. The section provides as follows; "Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:
  - “(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;
  - (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;



- (c) An intent to commit a felony;
- (d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

38. PW1 told the court that the 1st accused had an iron bar with he used to hit the deceased on the head. The impact caused a closed fracture of the skull according to the pathologist and bleeding on the left side of the brain. The weapon of the attack, an iron bar and directing it on a sensitive part the human body like the head was evidence of malice on the part of the 1st accused. He knew or ought to have known that particular attack had the potential to kill or cause grievous harm to the deceased. I am satisfied that the circumstances set out in section 206(2) of the penal code were met.
39. In the end, I find that the prosecution has proved the offence murder against the 1st accused pursuant to Section 203 as read with Section 204 of the [Penal Code](#), and I convict them accordingly.
40. The 2nd Accused is hereby acquitted for reasons aforesaid. He shall be set free forthwith unless otherwise lawfully held.

**DATED, SIGNED AND DELIVERED AT ISIOLO, VIA MICROSOFT TEAMS, THIS 20TH DAY OF FEBRUARY, 2025.**

**S. Chirchir**

**Judge**

In the presence of:

Godwin Luyundi- Court Assistant

Both accused persons

Ms. Kagai for DPP.

